

No. 12030.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

EWELL TOOBERT,

Appellant,

vs.

TIGHE E. WOODS, Housing Expediter, Office of the
Housing Expediter,

Appellee.

APPELLANT'S REPLY BRIEF.

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ARGUMENT.

On pages 8-9 of his brief appellee has quoted two questions and answers from the testimony of witness Jack Hammond, to the effect that Hammond paid Toobert \$18.00 from the monthly rental of each tenant. There are contradictions in the testimony of this witness, who, be it noted, is not our witness and was not called by us, and we think that a reading of his entire testimony is the only satisfactory way to resolve these inconsistencies. Taken as a whole, we submit that the only reasonable conclusion to be drawn is that Hammond meant to inform the court that his payments to Toobert were flat payments, first of \$150.00 per month and later of \$125.00 per month, and that the obligation to make such payments was indepen-

dent of, and not contingent upon, his collection of rents from the occupants. Thus in the later portions of his testimony, when both the court and appellee's counsel attempted to resolve these inconsistencies, the witness testified as follows:

"The Court: Were you renting these apartments to these different people here yourself?

The Witness: Yes, sir.

The Court: You were renting them yourself?

The Witness: Yes, sir.

The Court: What did the other defendant have to do with it?

The Witness: Owner. Who?

The Court: Mr. Toobert.

The Witness: Toobert, yes; he is the owner. I don't know, frankly speaking, if he is or not. I was renting from him.

The Court: You were renting from him and renting to these others, is that it?

The Witness: Yes. First, Mr. Toobert decided to sell me the place.

The Court: After that you rented, you said, to these other people?

The Witness: Yes, sir." [Tr. p. 107]

and:

"Q. When you were renting these places how much money did you turn over to Mr. Toobert in the aggregate? Did you turn it over depending on how much you took in or did you turn over a flat sum every month? A. A flat sum every month.

Q. How much was that? A. When I first taken that, I turned over \$150.00 to him every month for one year." [Tr. p. 111.]

The appellee, as did the trial judge in his oral opinion, lays stress on the asserted proposition of law that under California law an oral agreement to sell real property is "void from the start." The law in California is that contracts within the statute of frauds are not void, but are merely unenforceable by judicial procedure, although valid in other connections and for other purposes; such contracts are neither illegal nor void, but in themselves, and apart from the question of remedy, are perfectly valid. Thus, in *O'Brien v. O'Brien*, 197 Cal. 577 (241 Pac. 861), the Supreme Court of California states on page 586:

"It is the general rule, however, that a contract falling within the operation of the statute, but made in contravention thereof, is not invalid in the sense that it is void. It is merely voidable. The statute is said to relate to the remedy only and not to affect the validity of the oral contract. Such a contract, if otherwise valid, remains so, and the sole effect of the statute is to render it unenforceable by one party against the will of the other who abandons or repudiates it."

And to the same effect, and explicitly holding that such a contract is not void are:

Ayoob v. Ayoob, 74 Cal. App. 2d 236 at 242, 168 P. 2d 462;

Thompson v. Schurman, 65 Cal. App. 2d 432 at 438, 150 P. 2d 509;

Taylor v. Hill Co., 67 Cal. App. 2d 581, 154 P. 2d 926.

The three cases cited on page 9 of appellee's brief not only do not support the proposition that such contracts are void, but the case of *Dondero v. Aparicio*, 63 Cal. App. 373, 218 Pac. 608, is to the opposite effect. Thus, to the extent that appellee's argument is based on the oral contract being void, it must necessarily fall to the ground.

In a discussion of the sufficiency of the evidence to support the crucial findings, let us point out that we are not concerned here with any question of conflict of evidence, or balancing of credibility of witnesses, one against the other. We do not challenge the sufficiency of plaintiff's evidence because we contend his witnesses did not speak the truth. We challenge it because giving full credit to that testimony, it still falls far short of that necessary *substantial evidence* which the law requires to support a finding of fact. In our opening brief we discussed the evidence to which appellee refers on page 10 of his brief—in fact we quoted most of it—and we will avoid repetition; however, we must point out that appellee has been overzealous in his summary on page 10; thus there is no evidence that Toobert knew what the maximum rents were, hence he could not have known of the overcharges, nor does the evidence at all bear out the statement that Toobert "promised the tenants to make repairs." Appellee's last two items, (f) and (g) are really identical, and we wish merely to observe that whether Hammond did or did not spend money for repairs in the houses does not even remotely have any probative value in deciding whether privacy existed between Toobert and the tenants.

There seems to be implicit in some passages of appellee's brief the idea that Toobert had the affirmative duty of disproving plaintiff's allegations. That such a conception is erroneous requires no citation of authority. Our whole contention is that plaintiff failed to make out a *prima facie* case, and if we are correct in that, then the judgment cannot stand.

Respectfully submitted,

GEORGE W. DOWNING, JR.,
Attorney for Appellant.

